BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

EVEARD A. GODING
(Claimant-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-47
Case No. 69-933

S.S.A. No.

LUCKY STORES, INC.
(Employer-Respondent)

Employer Account No.

The claimant appealed from Referee's Decision No. OAK-8659 which held that the claimant was not unemployed during the period October 29, 1967 through January 13, 1968 within the meaning of section 1252 of the Unemployment Insurance Code and was liable for repayment of $715 representing benefits paid during this period.

STATEMENT OF FACTS

The claimant was employed by the above identified employer as a warehouseman and along with two other employees was discharged on October 27, 1967. He filed an additional claim for unemployment benefits effective October 29, 1967 and received unemployment benefits at the weekly rate of $65 for the 11 weeks ended January 13, 1968.

After the claimant was discharged he entered a grievance with his union regarding the discharge and as a result of negotiations between the union and the employer the claimant was returned to work on January 16, 1968. The agreement arrived at between the employer and the union which resulted in the claimant's return to work reads as follows:

> "Confirming our understanding in adjusting the grievances arising from the lay-offs of . . . Eveard A. Goding . . . we will make payment in the form of a supplemental unemployment benefit to the three grievants. These payments will be in the form of the difference between their normal weekly wage, as set forth in the Collective Bargaining Agreement between the parties, and whatever unemployment insurance benefits have been payable to the grievants in their individual cases."

As a result of this agreement, the claimant received from the employer a gross amount of $934.80 which represented wages he would have earned had he not been discharged, less the amount of unemployment benefits he received during his period of unemployment.

According to the testimony of the employer's representative at the referee's hearing, the payment made to the claimant was to "make him whole" for the wages lost due to his discharge in violation of the union agreement.

On August 14, 1968 the Alameda Office of the Department of Employment issued a determination holding the claimant ineligible for benefits for the period October 29, 1967 through January 13, 1968 on the ground that he was in receipt of wages and not unemployed within the meaning of section 1252 of the Unemployment Insurance Code. On the same day the Alameda Office of the department issued a notice of overpayment holding the claimant liable for repayment of $715 representing benefits paid during his period of unemployment.

It is the contention of the employer that the money received by the claimant from the employer in accordance with the agreement between the employer and the union represented supplemental unemployment benefits and did not represent wages.

REASONS FOR DECISION

Before considering the merits of this case, it is necessary, in our opinion, to dispose of the contention of the employer that the monies received by the claimant represented supplemental unemployment benefits.

Section 1265 of the Unemployment Insurance Code provides as follows:

> "1265. Notwithstanding any other provisions of this division, payments to an individual under a plan or system established by an employer which makes provisions for his employees generally, or for a class or group of his employees, for the purpose of supplementing unemployment compensation benefits shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of payments under such arrangements or plans.
>
> "This amendment is hereby declared to be merely a clarification of the original intention of the Legislature and is not a substantive change, and is in conformity with the existing administrative interpretation of the law."

It appears from the record that the "plan or system" established by the employer was established after the claimant lost his job and after he entered a grievance with his union, which grievance was settled in favor of the claimant. True, there were two other employees concerned in this matter, but, in our opinion, this does not indicate that the employer had made "provisions for his employees generally, or for a class or group of his employees" for the purpose of supplementing unemployment benefits but rather to make the employees whole for the wage loss they suffered.

As pointed out by the California courts in Powell et al v. California Department of Employment (1965), 45 Cal. Rptr. 136:

> ". . . To resolve the issue according to the label attached, as respondents urge, would accord greater weight to form than to substance . . . ."

That is, we believe that merely calling these payments supplemental unemployment benefits does not make them such.

The amount of money the claimant received was based on what he would have been paid for full-time employment, based on the union scale had his employment not been terminated. In our opinion this money represented a back pay award and it is necessary to decide if the claimant was "unemployed" during the period he received benefits.

Section 1252 of the Unemployment Insurance Code provides in part:

> "1252. An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount. . . ."

In Social Security Board v. Nierotko (1946), 327 U.S. 358, 66 S. Ct. 637, the United States Supreme Court held that "back pay" awarded as the result of a wrongful discharge constituted wages for services within the meaning of the Social Security Act, even though the employee had not worked during the period for which he was paid. The court said, in an opinion by Mr. Justice Reed:

> ". . . We think that 'service' as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer."

Mr. Justice Frankfurter, in a concurring opinion, said:

> "The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another, though he be inactive. E. g., Armour & Co. v. Wantock, 323 U.S. 126. This is, practically speaking, the ordinary situation of employment in a stand-by capacity. United States v. Local 807, 315 U.S. 521, 535. The basis of a back pay order under the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151, is precisely that. When the employer is liable for back pay, he is so liable because under the circumstances, though he has illegally discharged the employee, he still absorbs his time. Phelps Dodge Corp. v. Board, 313 U.S. 177. In short, an employer must pay wages although, in violation of law, he has reduced his employee to enforced idleness. Since such compensation is in fact paid as wages, it is a plain disregard of the law for the Social Security Board not to include such payments among the employees' wages. . . ."

The agreement entered into between the employer and the union resulted in the claimant being reinstated in employment with back pay for time lost between October 27 and the date of his reinstatement, less an amount equal to the amount of unemployment compensation received by the claimant.

Under the rule of the Nierotko case the back pay award constituted wages allocable to the period following October 27, 1967. We must now consider the amount of wages payable to the claimant during the weeks he received unemployment benefits so as to determine his status as an unemployed individual.

In Marshall Field and Co. v. National Labor Relations Board (1943), 318 U.S. 253, 63 S. Ct. 585, the United States Supreme Court held that benefits received by employees under a state unemployment compensation act were plainly not "earnings" which could be deducted from back pay awards (see also National Labor Relations Board v. Gullett Gin Company, Inc. (1951), 340 U.S. 361, 71 S. Ct. 337, in which the Supreme Court upheld the order of the National Labor Relations Board in refusing to deduct unemployment compensation payments from a back pay award).

The agreement between the employer and the union permitted the employer to deduct from the back pay award the amount of unemployment insurance benefits received by the claimant. We have no power to modify the award insofar as it orders that the claimant be reinstated with back pay for time lost. But we do have jurisdiction to determine the claimant's eligibility for unemployment insurance benefits and to the extent that the agreement purported to determine that eligibility it has no binding effect upon us. In agreeing that the amount of back pay due the claimant be reduced by the amount of unemployment insurance benefits he received, the agreement was in effect determining that the claimant was eligible for the benefits he received and that the Unemployment Insurance Fund should bear a part of the burden in making the claimant whole. The employer and the union had no authority to make such a determination for the jurisdiction to determine the claimant's eligibility rests first with the Director of Employment and then with a referee and this Appeals Board, if appeals are taken therefrom (sections 1328, 1334 and 1336 of the Unemployment Insurance Code).

In view of the foregoing, if we find that the claimant was not eligible for the unemployment benefits he received and that he is liable for such benefits, the effect of our decision will be to place the claimant in a position as though he had received no benefits and under the agreement reinstating him in employment he would be entitled to full back pay for the time lost between October 27 and the date of his reinstatement.

We have held in this decision that the back pay award constituted wages allocable to the period following October 27, 1967. Under section 1252 of the Unemployment Insurance Code an individual is not "unemployed in any week if the wages payable to him with respect to that week exceed his weekly benefit amount." We find that the wages payable to the claimant with respect to the weeks for which he claimed unemployment insurance benefits exceeded his weekly benefit amount. Therefore, he was not "unemployed" during the weeks in question and was not eligible for the benefits he received. The benefits paid to the claimant constitute an overpayment and the further issue is whether he should be required to repay these benefits.

Section 1375 of the code provides as follows:

"1375. Any person who is overpaid any amount as benefits under this part is liable for the amount overpaid unless:

"(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and

"(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

In Benefit Decision No. 5960 and Miscellaneous Decision No. 431 we held that it is not against equity and good conscience to recover overpaid benefits where a claimant receives back pay allocable to the same period for which the claimant received unemployment benefits. Although the claimant in this matter was free from misrepresentation, wilful nondisclosure or fraud, and was not at fault in receiving the benefits, the reasoning followed in the cited decisions is applicable here. Further, unemployment benefits are paid out of public funds, and to permit a recipient of benefits to retain such payments when he has been compensated for his wage loss would unjustly result in a charge to the fund to the detriment of the public at large. We conclude that it is not against equity and good conscience to require that the claimant repay the benefits which have been overpaid.

We recognize the problems this disposition of the case may create for the claimant. However, those problems are properly a matter for resolution between the claimant and his employer, and may not be permitted to influence the decision of this board.

DECISION

The decision of the referee is affirmed. The claimant was not unemployed within the meaning of section 1252 of the Unemployment Insurance Code during the period October 29, 1967 through January 13, 1968. He has been overpaid benefits of $715 and is liable for repayment of that amount.

Sacramento, California, July 15, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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